ORIGINAL

NO. 88-7247

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

BRYAN STUART LANKFORD,

Petitioner,

vs.

THE STATE OF IDAHO,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

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TABLE OF CONTENTS

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STATEMENT OF THE CASE

The petitioner, Bryan Stuart Lankford, was sentenced to death for the murders of Robert Bravence and Robert's wife, Cheryl.

In June of 1983, Bryan Lankford was on probation in Texas after having been convicted of a Houston robbery. (Trial Tr., Vol.IV, p.672.)

One of the conditions of probation was that Bryan not associate with his older brother, Mark Lankford. (Trial Tr., Vol.IV, p.678.) Nonetheless, Lankford had violated this condition of probation, together with several others. (Trial Tr., Vol.IV. pp.679-681.) Lankford believed that these probation violations would probably result in his imprisonment (Trial Tr., Vol.IV, p.682), and he decided to go to Mexico, Id., but when he contacted his brother Mark, Mark suggested that he and Bryan leave Texas together. (Trial Tr., Vol.IV, p.684.)

The Lankfords made their way to Idaho County, Idaho, where they camped in the forest for a few days and then decided to

abandon Mark's car, thinking that the police seeking Bryan, and the General Motors Acceptance Corporation, which had not been paid for the car, might be looking for it. (Trial Tr., Vol.IV, pp.690-691.) The car was driven into the woods and camouflaged with tree branches. (Trial Tr., Vol.IV, p.260, ls. 18-22; Vol. II, P.302, ls.10-12; Vol.IV, pp.636-637.)

After hiding Mark's car, the Lankford brothers set off on foot down a mountain road.

Robert Bravence, an officer of the United States Marine Corps (Trial Tr., Vol.II, pp.282), et seq.), and his wife, Cheryl, were vacationing in the area. The Bravences had called Bravence's mother, Gilda L. Howard, from Grangeville on June 21, 1983. (Trial Tr., Vol.III, p.435.)

Catching sight of the Bravences, the Lankford brothers decided to steal their car and spent some time discussing the prospect. See: Trial Tr., Vol.V, pp.767, 769; Vol.III, p.529, ls.6-9.

In a statement made to an FBI agent, Bryan stated that after an hour of discussion, he and Mark decided to steal the Bravences' van. They then walked into the camp where the VW van was parked. Bryan was carrying a shotgun which he held on Robert Bravence while Mark ordered Bravence to kneel down on the ground. (Tr., Vol.III, p.529, ls.13-15.) "Mark then hit the man over the head with a nightstick like a policeman uses. . . The woman came up from a nearby creek about that time, and Mark told her to get on the ground. She said something about her husband being hurt on the ground; and, then, she got on the ground. Mark then hit the woman over the head with the same nightstick that he had hit the man on the head with." (Trial Tr., Vol.III, p.529, ls. 15-23.) The appellant also stated to Randy Baldwin, an Idaho County Deputy Sheriff, that Mark had struck the male victim on the head while he, Bryan, held a shotgun on the victim, and when the female victim came up from the river Mark told her to get down on the ground and struck her on the head also. (Trial Tr., Vol.IV, pp.650-651.)

The Lankfords left Idaho in the Bravences' van. They drove the van into Oregon, where they stayed overnight at a Holiday Inn in Wilsonville, near Portland. They purchased accommodations and food with the Bravences' credit card. Bryan forged Bravence's name to the credit card receipts, using his own driver's license for identification. (Trial Tr., Vol.III, p.530.) He also used the Bravences' travelers checks, which had been found in the glove compartment of their van. Id.

Appellant's fingerprints were found on charge slips associated with the use of the Bravences' credit card. See Trial Tr., Vol.III, pp.536, 540, 541, 567-68, 589; Exhibits 78-79.

From June 22 through July 7, after the Bravences were dead, in excess of $3,000 was charged to their credit card. (Trial Tr., Vol.III, p.448.)

Appellant and his brother drove the Bravences' van to Los Angeles, California, where they abandoned it on a public street in early July of 1983. (Trial Tr., Vol.II, p.531, l.25; Vol.II, p.274.)

The Lankfords were apprehended in the state of Texas and returned to Idaho for trial. The two brothers were tried separately. Bryan Lankford was convicted and sentenced to death, as was Mark.

Lankford's conviction and sentence were reviewed by the Supreme Court of Idaho. That court considered and rejected the claim that Lankford had insufficient notice of the possibility that the penalty of death might be imposed, that the court had

improperly relied on testimony compelled under a grant of immunity, and that the court at sentencing was not entitled to rely on any evidence other than that produced through the testimony of witnesses present in court. On Lankford's first petition for writ of certiorari, this Court remanded the cause to the Supreme Court of Idaho for reconsideration in light of Satterwhite v. Texas, 486 U.S. ___ (1988). The Idaho Supreme Court upheld Lankford's conviction and sentence on grounds not challenged here. State v. Lankford, 747 P.2d 710 (Idaho 1987).

SUMMARY OF ARGUMENT

1. The questions presented by Lankford's petition for certiorari are beyond the scope of this Court's order remanding the cause to the Supreme Court of Idaho for reconsideration in light of Satterwhite v. Texas, 486 U.S. ___ 1988. Lankford now raises two issues not previously considered by the Supreme Court of Idaho and two issues that were incorporated in his prior petition for certiorari but which were not encompassed by this Court's order of remand.

2. Lankford's claim that the decision of the Supreme Court of Idaho rejecting the rationale of Adamson v. Ricketts, 865 F.2d 1011 (9th. Cir. 1988), creates a conflict which should be resolved by this Court, has been answered by this Court's decision in Hildwin v. Florida, No. 88-6066, May 30, 1989, which holds that there is no requirement in the Constitution that capital sentences be imposed by a jury.

3. Although the trial judge imposed the death penalty notwithstanding a contrary recommendation by the prosecuting attorney, the Idaho homicide statutes gave Lankford constitutionally adequate notice of the potential penalty for first-degree murder. His argument to the contrary raises no important federal question not already decided.

4. This Court's precedent authorizes the use of a broad range of hearsay information in capital sentencing proceedings. Accordingly, petitioner's claim that the confrontation clause is violated by the consideration of hearsay evidence in the penalty phase of the capital case raises no important constitutional question.

5. A state may appropriately require the defendant to shoulder a burden of pursuading the sentencing authority that mitigating factors are sufficient to preclude the imposition of the death sentence. Petitioner's claim to the contrary raises no important federal question.

REASONS FOR DENYING THE WRIT

1. The Federal Questions Raised By Lankford's Petition For Certiorari Are Not Within The Scope Of This Court's Mandate To The Supreme Court Of The State Of Idaho.

This is petitioner's second application for a writ of certiorari. It exceeds the scope of the opinion below.

In his first petition, Lankford presented the following issues:

1) "Certiorari should be granted ... to review the state court's decision approving a death sentence imposed after defense counsel has presented no evidence or argument against imposition of the death penalty and reliance on written notice that the death penalty would not be sought by the state,"

2) "Whether partial reliance at sentencing by a judge on testimony compelled from a capital defendant under an express grant of immunity violates the Fifth and Fourteenth Amendments and whether use of the testimony can be considered harmless error,"

3) "Whether there is a conflict between the Idaho Supreme Court and the Federal Court relating to the right to

confrontation of witnesses at the penalty phase of a capital case," and

4) "Whether the State of Idaho's application of its 'heinous, atrocious, or cruel' aggravating circumstance comports with the Eighth Amendment principles of Godfrey v. Georgia, ... "

On June 13, 1988, this Court ordered that the judgment of the Supreme Court of Idaho be vacated and the case remanded "for further consideration in light of Satterwhite v. Texas, 486 U.S. ___, 1988."

On remand, petitioner argued to the Supreme Court of Idaho that Satterwhite v. Texas delineated Fifth and Sixth Amendment violations arising out of the circumstance that Lankford had been given immunity from future prosecutions for robbery and the fraudulent use of credit cards. He also asserted issues of state law previously decided on direct appeal. The Idaho Supreme Court found that the issue of a Sixth Amendment violation had been defaulted because it was not timely raised in the state courts, that there was no factual predicate for Lankford's Fifth Amendment claim and that, even if there had been, Lankford had waived the Fifth Amendment privilege by testifying on the subject matter of the claim at his trial. State v. Lankford, Nos. 15760/16170, April 4, 1989.

Lankford now seeks review of the decision of the Supreme Court of Idaho on remand. He does not, however, offer any issue considered by the Idaho Supreme Court in response to this Court's order in Lankford v. Idaho, 486 U.S. ___, 108 S.Ct. 2815 (1988). Instead, he raises two new issues not considered by the Idaho Supreme Court and two issues that were incorporated in his prior petition for certiorari but were not encompassed by this Court's order of remand in Lankford v. Idaho, supra.

With respect to issues not previously considered in the state courts, this Court has held that it will not address a federal question in cases where the highest court of the state has not decided the federal question or the question was not presented in such manner that it was necessarily decided by the action of the state court. Street v. New York, 394 U.S. 576 (1969). The Court has also followed the assumption that where a state court has failed to pass upon a federal question, the omission was due to want of proper presentation in the state's courts unless the aggrieved party can affirmatively show the contrary. Id; Bailey v. Anderson, 326 U.S. 203 (1945); Chicago I. & L. R. Company v. McGuire, 196 U.S. 128 (1905).

A litigant's failure to present a federal question in conformance with state procedure, for which failure a state court declines to consider the federal question, constitutes an adequate state ground, barring review in this Court. Michigan v. Tyler, 436 U.S. 499 (1978).

With respect to the issues previously presented to this court by Lankford's prior petition, this Court has already acted upon that petition and limited its response to a remand for reconsideration of the case in light of Satterwhite v. Texas. The only question that should now be before the Court is whether the state court fully followed this Court's mandate. On remand for reconsideration it is contemplated that the state court will decide whether the conviction or sentence may stand in light of the precedent that brought about the remand. See, Yates v. Aiken, 484 U.S. ___ (1988). The petitioner does not even argue that the Idaho Supreme Court failed to follow this Court's mandate.

Even if the issues presented were properly before this court, there is no basis for granting a writ of certiorari to consider them.

2. The Conflict Between The Supreme Court Of Idaho And The Ninth Circuit Court Of Appeals Over Whether The Sixth Amendment Guarantees A Defendant A Jury Determination Of Statutory Aggravating Factors Has Been Resolved By This Court; No Important Reason To Grant The Petition For Certiorari Remains.

In Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988), en banc, the court of appeals held that the statutory aggravating circumstances, set out in an Arizona statute that was, for practical purposes, the same as the Idaho capital sentencing statute, were elements of an offense of "capital murder," for which reason it was necessary that the death penalty be imposed by a jury. Having concluded that the sentence enhancement factors of the Arizona statute were elements of an offense the court of appeals defined as "capital murder," the court went on to distinguish Spaziano v. Florida, 468 U.S. 447 (1984), on the ground that "it left untouched the question of the right to a jury trial where the aggravating circumstances of a state's death penalty statute are elements of a capital offense." 865 F.2d at 1029.

This Court has since established that the rationale used by the court of appeals in Adamson is invalid, Hildwin v. Florida, No. 88-6066, May 30, 1989. Accordingly, there is no reason to grant the writ to resolve this question.

3. Lankford's Assertion That A Protected Right Was Violated Because The Judge Imposed The Death Penalty Even Though The State Did Not Seek It, Raises No Important Constitutional Question Not Already Decided.

After Lankford had been convicted of first-degree murder, the district court directed that the prosecuting attorney give written notice of his intent to seek the death penalty. The prosecutor responded that he was not asking for the death penalty. See, State v. Lankford, slip op. at 14; Petitioner's Appendix A-14.

In the Idaho Supreme Court, Lankford argued that because the prosecutor had not recommended the death penalty he was entitled to formal notice by the trial court that it would consider the death penalty at sentencing.

Lankford's first claim in this Court is that he did not receive the quality of notice that the due process clause guaranteed to him. The law is to the contrary.

The defendant was not entitled to greater notice than given by the Idaho homicide statutes, which made clear that the court could impose the penalty of death. See Idaho Code § 19-2515(c)(d)(e). Clearly, the defendant was, or should have been, aware that the court and not the prosecuting attorney would impose sentence. Decisions by the Idaho appellate courts have been consistently clear that the sentencing judge is not bound by recommendations of the prosecuting attorney. See, State v. Torres, 736 P.2d 853 (Idaho App. 1987); Williams v. State, 747 P.2c 94 (Idaho App. 1987); State v. Lankford, 747 P.2d 710 (Idaho 1987).

In Dobbert v. Florida, 432 U.S. 282 (1977), the trial judge, in accordance with Florida statutory procedure, imposed the death penalty even though the jury had recommended a life prison term. This Court upheld the death penalty against an ex post facto argument, pointing out that "the statute was intended to provide maximum deterrence, and its existence on the statute books provided fair warning as to the degree of culpability which the state ascribed to the act of murder." 432 U.S. at 297; cf.: Lockett v. Ohio, 438 U.S. 586 (1978) (state court's consistent construction of statute afforded notice sufficient to satisfy due process requirement).

Dobbert, which was relied upon by the Supreme Court of Idaho in rejecting Lankford's due process claim, and Lockett dispose of the issue.

In his petition for certiorari, Lankford adds a claim not made in the Idaho Supreme Court that the court's action in sentencing him to death against the prosecuting attorney's recommendation denied him effective assistance of counsel because his sentencing counsel was assertedly "misled" by what appears to be a self-constructed representation that it was not necessary to prepare against the possibility of a death penalty.

Lankford's argument that he was denied effective assistance of counsel because, as petitioner puts it, "the proceedings go beyond a lack of notice to an affirmative misleading of counsel," Petition, p.13, is both factually inaccurate and procedurally deficient.

Prior to the sentencing proceeding, Lankford moved to dismiss his counsel.

Initially, the trial judge appointed Lankford's present counsel, Joan Fisher, Esq., to work with his trial counsel. Thereafter, through his newly-appointed co-counsel, Lankford moved to dismiss his trial counsel from the case. Lankford was admonished that he would not be permitted to unduly delay sentencing by requests to change counsel. Given that admonition, Lankford persisted in his motion to dismiss trial counsel. The court asked trial counsel to remain available to give Lankford's new counsel any information concerning the case she might need.

The trial court made extensive inquiry into the information available to Ms. Fisher for sentencing purposes. The prosecuting attorney stated that all necessary information was available in the preliminary hearing transcript, which had been furnished Ms. Fisher. Trial counsel stated that the preliminary hearing evidence paralleled in every significant way the evidence offered at trial. Mr. Fisher stated that she had had a chance to review the preliminary hearing transcript. Arrangements were made to furnish her with the audio tapes of the trial proceedings to compare with the transcript of the preliminary hearing.

Lankford produced a number of witnesses in his behalf at the sentencing hearing. The witnesses called in mitigation sought to diminish Lankford's culpability for the crime, suggesting that he was dominated by his older brother, Mark Lankford.

Clearly, petitioner's counsel was not misled.

Moreover, this claim was not presented to the Idaho Supreme Court. The Court has held that it will not consider a federal question in cases where the highest court of the state has not decided the federal question, or the federal question was not presented in such a manner that it was necessarily decided by the action of the state court. Street v. New York, 394 U.S. 576 (1969). Where a state court has failed to pass upon a federal question, it will be assumed that the omission was due to the want of proper presentation in the state courts unless the aggrieved party can affirmatively show the contrary. Id. See also, Bailey v. Anderson, 326 U.S. 203 (1945); Chicago I., & L.R. Co., v. McGuire, 196 U.S. 128 (1905).

A litigant's failure to present a federal question in conformance with state procedure, for which failure a state court declines to consider the federal question, constitutes an adequate state ground, barring review in the United States Supreme Court. Michigan v. Tyler, 436 U.S. 499 (1978).

4. Petitioner's Claim That There Is A Conflict Among Lower Courts Respecting The Right To Confrontation At The Penalty Phase Of A Capital Case Raises No Important Federal Question Not Already Decided.

Idaho Code § 19-2515(d) provides:

> In all cases in which the death penalty may be imposed, the court shall, after conviction, order a presentence investigation to be conducted according to such procedures as are prescribed by law and shall thereafter convene a sentencing hearing for all purpose of hearing all relevant evidence and arguments of counsel in aggravation and mitigation of the offense. At such hearing, the state and the defendant shall be entitled to present all relevant evidence in aggravation and mitigation. Should any party present aggravating or mitigating evidence which has not previously been disclosed to the opposing party or parties, the court shall, upon request, adjourn the hearing until the party desiring to do so has had a reasonable opportunity torespond to such evidence. Evidence admitted at trial shall be considered and need not be repeated at the sentencing hearing. Evidence offered at trial but not admitted may be repeated or amplified if necessary to complete the record.

Many other states authorize the sentencing court to consider the trial record, presentence investigative reports, and other offender's record of prior convictions at sentencing, whether sentencing is conducted by a judge or jury. See, e.g., Ala. Code § 13A-5-45; Ariz. Rev. Stat. Annot. Code § 13-703; Colo. Rev. Stat. § 18-3-101; Conn., Gen. Stat. § 53a-46a(c); Del. Code Annot. § 4209c; Fla. Stat. § 921.141; Ill. Rev. Stat. Ch. 38, para. 9-1(e); Ky. Rev. Stat. § 532.025(1)(a);(b); Md. Annot. Code art. 27, § 413(c); Mont. Code Annot. § 46-18-302; Neb. Rev. Stat. § 29-2521; Nev. Rev. Stat. § 175.552; Or. Rev. Stat. § 163.150; Pa. Cons. Stat. 42 § 9711; Tenn. Code Annot. § 39-2-203(c); Tex. Penal Code Annot. art. 37.071; Utah Code Annot. § 76-3-207(2); Wash. Rev. Code Annot. § 10.95.060(3); Wyo. Stat. § 6-2-102(c).

Petitioner, relying on cases that generally distinguish capital proceedings from other criminal cases and that generally address the right of confrontation at trial, argues that the confrontation clause precludes any evidence at sentencing other than that obtained from witnesses attending in person and subject to cross-examination. The argument is contrary to a long line of cases decided in this Court.

It is clear that the sentencing court is authorized to consider a great many things which could not properly be admitted at the trial of guilt or innocence. That it shouldbe so is not at all illogical because the objects of the trial and of the sentencing proceeding are different. At trial, great care must be taken to exclude information about those aspects of the defendant's character and background which might influence the jury to believe he was guilty of the crime charged merely because he was a generally evil person. Williams v. New York, 337 U.S. 241- (1949). At sentencing, however, the same information about the defendant's character and background which must be excluded at trial must be considered if the court is to make a well-informed decision about what disposition to make of the offender. The sentencing court must be given access to the broadest range of information available about the defendant, Roberts v. United States, 445 U.S. 552 (1980), and the sentencing judge's inquiry is largely unlimited either as to the kind of information which may be considered, or its source, United States v. Grayson, 438 U.S. 41 (1978).

The purpose of the inquiry at sentencing is to make the punishment fit both the offender and the crime, and for that reason the information which may presented at sentencing is broader than that which is appropriately received at trial. Grayson, supra; Williams v. New York, supra.

The court held in Williams that the due process guarantee was not violated when the sentencing judge considered information from a presentence investigative report. Williams

was sentenced to death. In this Court he argued that he had been deprived of due process of law because the sentencing authority had considered information from sources other than witnesses testifying in person.

The defendant's protection in these circumstances lies in his right to respond to whatever information may be presented. Williams, supra. That right is specifically codified by Idaho Code § 19-2515(d).

The principles stated above have been applied in cases involving the confrontation clause. Cf.: Williams v. Oklahoma, 358 U.S. 576 (1959) ("State's attorney's statement of the details of the crime and of petitioner's criminal record -- all admitted by petitioner to be true -- did not deprive petitioner of fundamental fairness or of any right of confrontation or cross-examination").

5. No Important Federal Constitutional Question Is Raised By The Claim That There Is A Conflict Between The State Of Idaho And The Ninth Circuit Over Whether The Idaho Death Penalty Statute Creates An Unconstitutional Presumption Of Death Under The Eighth And Fourteenth Amendments.

Petitioner, relying on Adamson v. Ricketts, supra, contends that the Idaho death penalty statute creates a constitutionally impermissible "presumption of death" by the device of "placing the burden of proof of mitigating factors on the defendant." Petition for Certiorari, pp. 17-18.

The court of appeals' view is at odds with this Court's decisions upholding various death sentencing statutes constructed according to different models. See, Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Profitt v. Florida, 428 U.S. 242 (1976); Lowenfield v. Phelps, 484 U.S. ___, 108 Sup.Ct. 346 (1988). The Court has made it clear that the constitutional sufficiency of a capital sentencing scheme depends upon whether the statute "narrows the class of death eligible murders and then at sentencing allows for consideration of mitigating circumstances and the exercise of discretion." Lowenfield v. Phelps, 484 U.S. at 108. A state is entitled to assign the defendant a burden of persuasion or a burden of going forward with evidence:

> [The Supreme Court] should not lightly construe the constitution so as to intrude upon the administration of justice by individual states ... [I]t is normally within the power of the state to regulate procedures under which its laws are carried out, including the burden of production of evidence and the burden of persuasion. ... If the state ... chooses to recognize a factor that mitigates the degree of criminality or punishment ... , the state may assure itself that the fact has been established with reasonable certainty. Patterson v. New York, 432 U.S. 197, 201,209 (1977).

The sentencing authority's discretion must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action," Gregg v. Georgia, 428 U.S. 153, 189 (1976), while allowing the sentencing authority to give "particularized consideration to relevant aspects of the character and record of each defendant before imposition upon him of a sentence of death." Woodson v. North Carolina, 428 U.S. 280, 303 (1976). Neither goal is defeated by requiring the defendant to prove the facts underlying a factor in mitigation to the satisfaction of the sentencing authority.

No significant and undecided federal question is proferred by this claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

DATED this 5 day of July, 1989

Respectfully submitted,

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CERTIFICATE OF MAILING

I, LYNN E. THOMAS, counsel of record for respondent, State of Idaho, do state under oath, pursuant to Rule 28.2, that the original of the accompanying respondent's RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO was placed in the United States mail on July 5, 1989, first class postage affixed, at Boise, Idaho, addressed to:

Joseph F. Spaniol, Jr.
Clerk of the Court
United States Supreme Court
One First Street, N.E., Room 17
Washington, DC 20543

Lynn E. Thomas
LYNN E. THOMAS

CERTIFICATE OF MAILING